No. 2735.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PACIFIC CASUALTY COMPANY, a Corporation,
Plaintiff in Error,

vs.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY, a Corporation,
Defendant in Error.

Brief of Plaintiff in Error.

MYRICK & DEERING,
JAMES WALTER SCOTT,
916 Nevada Bank Bldg.,
Attorneys for Plaintiff in Error.

Filed this.....day of May, 1916.

....., Clerk.

By.....Deputy Clerk.

The James H. Barry Co.,
San Francisco

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vs.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY, a corporation,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case was brought to this Court on writ of error from the District Court of the United States, in and for the Northern District of California. The General Bonding and Casualty Insurance Company, plaintiff below and defendant in error herein, recovered a judgment in the sum of $6,160.43 together with costs of suit. Both plaintiff and defendant in error are insurance companies. The defendant in error is a corporation incorporated under the laws of the State of Texas and it was on all pertinent dates en-

gaged as a surety company in giving bonds, especially supersedeas appeal bonds in Texas. The defendant below was a casualty insurance company and was at all the times referred to in the complaint, engaged in the business of issuing policies of employer's liability insurance in Texas and elsewhere.

On June 18th, 1911, plaintiff in error, the Pacific Coast Casualty Company, issued to Elmo Rock Company, a policy of employer's liability insurance, by which plaintiff in error insured Elmo Rock Company, a Texas corporation, for the term of one year ending June 18th, 1912, with a limit of $5000.00 on account of an accident to one person, against loss and expense arising from claims upon said assured for damages on account of bodily injuries accidently suffered, or alleged to have been suffered during the period of said policy. By its said policy, the plaintiff in error further agreed that if suit should be brought against said Elmo Rock Company on account of an accident, the Pacific Coast Casualty Company at its own expense would settle or defend such suit, whether groundless or not, and that the moneys expended in such defense should not be included in the limits of the liability fixed by said policy. The policy further provided that no action would lie for any loss or expense thereunder unless it was brought for loss or expense actually sustained and paid in satisfaction of a final judgment within 90 days from the date of said judgment and after trial of the issue (Record, pp.

13 to 19). The premium upon this policy was paid in due course by the assured.

In the year 1911, while said policy of insurance was in full force and effect, one J. B. Sowders, an employee of said Elmo Rock Company, accidently suffered bodily injuries by reason of the prosecution of the work of quarrying and crushing rock done by said company and by himself as its employee. For the recovery of damages therefor, he instituted an action in the District Court of Kaufman County, Texas, against said assured. The plaintiff in error defended the action and took upon itself the entire management and control thereof, in accordance with the provisions of its policy. The trial of said action resulted in the rendition therein on June 19th, 1912, of a money judgment in favor of said J. B. Sowders, and against said Elmo Rock Company for the principal sum of $5,000.00, with interest thereon at the rate of 6% per annum and all costs of suit. A copy of said judgment is set out as Exhibit B (Record, pp. 21 and 22).

Thereafter, one John Davis, a member of the firm of Messrs. Meador & Davis, attorneys-at-law at Dallas, Texas, who had been employed by plaintiff in error to defend said action on behalf of said Elmo Rock Company, gave notice to plaintiff in error that said judgment had been rendered (Record, pp. 140 and 141), and he was instructed by the plaintiff in error to proceed with the appeal of the case, but

was informed that the plaintiff in error would not furnish the supersedeas bond staying the execution (Record, p. 141). His order was "Kindly proceed with the appeal of this case, but you will understand that we do not furnish the supersedeas bond staying execution" (Record, p. 141). This telegram was sent Meador & Davis on June 28th, 1912.

Thereafter, Meador & Davis requested that the Elmo Rock Company furnish a supersedeas bond, which, under the Texas statute, was required to be furnished within 20 days after the rendition of a final judgment (Record, pp. 22 and 133). Elmo Rock Company refused to furnish said bond (Record, p. 142). Its refusal was communicated to plaintiff in error by Messrs. Meador & Davis, and on July 30th, 1912, Messrs. Meador & Davis were again informed by plaintiff in error that they should proceed with the appeal, but that the Elmo Rock Company must furnish its own supersedeas bond.

Meador & Davis were employed by plaintiff in error to represent the Elmo Rock Company, its assured. The firm did not represent plaintiff in error generally, but just represented it in specific cases that were placed in the hands of that firm (Record, p. 131). The extent of the authority conferred upon this firm was that it should defend the Elmo Rock Company in the case of J. B. Sowders vs. said Elmo Rock Company (Record, p. 133).

It was the uniform practice of the company to re-

quire the assured to furnish its own surety for a supersedeas bond (Record, p. 132). Despite this fact, on or about August 6th, 1912, John Davis, of the firm of Meador & Davis, requested defendant in error to furnish a supersedeas appeal bond in the case of *Sowders* vs. *Elmo Rock Company* (Record, pp. 121-122). According to the testimony of John B. Stephenson, President and General Manager of defendant in error, Mr. Davis telephoned to defendant in error on said August 6th, 1912, telling him that he would like to have defendant in error execute a bond as surety, and that he would call and discuss the matter with him. On that day, or the day following, Mr. Davis called upon Mr. Stephenson with the form of bond he wished executed. Defendant in error then telephoned a gentleman at Terrell and was advised by him that Elmo Rock Company was solvent (Record, pp. 122-123). The defendant in error also made some inquiries respecting the solvency of the Pacific Coast Casualty Company (Record, p. 123).

Thereafter, defendant in error executed the supersedeas bond (Record, p. 121), receiving from Mr. Davis an agreement of indemnity, being plaintiff's Exhibit D, (Record, pp. 150-151), which was signed "Pacific Coast Casualty Company, by John Davis, its attorney-at-law and in-fact." This agreement recited that whereas, a supersedeas bond was required on said appeal, and the defendant in error had agreed

to execute said bond as surety, therefore, in consideration of said agreement the plaintiff in error agreed and obligated and bound itself to indemnify the defendant in error against any loss, costs, charges, etc.

The record shows that John Davis was not attorney-in-fact for the plaintiff in error; nor was he attorney-at-law for plaintiff in error save that he was hired by plaintiff in error to defend the action brought against its assured, the Elmo Rock Company.

While the bond was furnisehd by defendant in error on or about August 6th, 1912, as above stated, the telegram to Meador & Davis, in which plaintiff in error declined to furnish supersedeas bond bore date June 28th, 1912, and the letter stating the assured must furnish its own bond bore date July 30th, 1912. The premium for this supersedeas bond was paid by plaintiff in error, as an expense incurred in connection with the case of *Sowders* vs. *Elmo Rock Company,* in settlement of its accounts with Miller-Stemmons Company (Record, p. 116). So far as the record discloses, the plaintiff in error was never informed by Meador & Davis, by the defendant in error, by Elmo Rock Company, or anyone else, that John Davis had either procured said supersedeas bond from the defendant in error, or had given to it an agreement of indemnity upon the issuance of said bond.

The judgment of the District Court of Kaufman County, Texas, from which the appeal was taken, was affirmed by the Court of Civil Appeals for the Fifth

Supreme Court Judicial District of Texas, March 15th, 1913. On June 27th, 1913, motion for a rehearing on an application for a writ of error was denied by the Supreme Court of the State of Texas. A copy of the final judgment of the Supreme Court was filed on July 5th, 1913, in the office of the Clerk of the Court of Civil Appeals. Thereafter, a writ of mandate was issued to the District Court of Kaufman County, and on August 10th, 1913, said mandate was duly filed with the Clerk of said Court. The judgment of the District Court thereupon became final in the sense that payment thereof was then enforceable.

Thereafter, on August 19th, 1913, a writ of execution was issued out of the said District Court of Kaufman County for the collection of said judgment, with interest and costs. On September 5th, 1913, the Sheriff levied execution upon the property of the Elmo Rock Company, and advertised said property for sale on October 7th, 1913. The Sheriff did not sell the property but under order of the District Court of Kaufman County, he turned over said property to W. D. Fletcher, as Receiver for the Elmo Rock Company, and the Sheriff made return of the writ of execution accordingly, showing that no property of defendant in error was found in said county.

Thereafter an alias writ of execution was issued out of said District Court of Kaufman County, commanding the Sheriff to make the required amount out of the property of defendant in error.

After execution was issued in the case of *Sowders* vs. *Elmo Rock Company* and levied on all of the property of the said Elmo Rock Company, the attorney of that Company placed all of its property in the hands of a receiver and stopped the execution (see Record, p. 101). The alias execution was directed against defendant in error, and under and by compulsion of that writ the defendant in error paid the judgment as surety on the supersedeas bond. The payment was made by the defendant in error without the execution of said alias writ (see Record, p. 183).

On October 22nd, 1913, defendant in error paid the principal sum of the judgment, together with interest. On October 25th, 1913, it paid court costs. After it had paid the principal sum of the judgment, together with interest and costs, the defendant in error obtained from the receiver of said Elmo Rock Company an assignment of whatever interest that Company had in its policy of liability insurance issued by the plaintiff in error. This assignment was dated November 4th, 1913.

Under this state of facts the General Bonding and Casualty Insurance Company, defendant in error, brought this action against the plaintiff in error to recover the sums of money expended by it as surety on the superesedeas bond.

SPECIFICATION OF ERRORS.

We desire to specify the following errors which are relied upon, each of which is asserted in this brief, and intended to be urged:

I.

The Court erred in denying defendant's motion to elect between the three separate causes of action set up in the amended complaint, to which plaintiff in error duly excepted, and exception was allowed. Proceedings in that respect were as follows:

> "MR. SCOTT—The defendant, if your Honor please, before the taking of the evidence begins, desires to move that the plaintiff be directed to elect between the three separate causes of action which, to our mind, are set up in the complaint, and to now state whether they are suing as assignee of the Elmo Rock Company by virtue of the assignment said to have been received by the receiver in a certain action in Texas, or whether they are proceeding on the theory that they, as surety, are subrogated to certain rights of the Elmo Rock Company. All three matters are set forth in the complaint. We demurred.
>
> "THE COURT—The demurrer was overruled, was it not?
>
> "MR. SCOTT—Yes; we demurred on these same grounds.
>
> "THE COURT—Your motion will be denied.
>
> "MR. SCOTT—We wish to make the motion

in aid of the demurrer so as to exercise our point, and we take an exception.

"THE COURT—Very well.

"Defendant's Exception No. 1."

(See Record, pp. 88 and 89, Assignment of Error No. 1).

II.

The Court erred in refusing to strike out the following testimony of witness Angus G. Wynne, to which plaintiff in error duly excepted, and exception was allowed. The testimony was as follows:

"Q. What steps did you take after filing of the mandate for the collection of the judgment?

"A. I applied to the firm of Meador & Davis, at Dallas, Texas, in person and by letter. They stated to me that their client would pay the money and it would come forward in a few days.

"MR. SCOTT—We move that the latter portion of the answer go out as hearsay.

"THE COURT—The motion is denied.

"Defendant's Exception No. 3."

(See Record, pp. 90 and 91, Assignment of Error No. III.)

III.

The Court erred in allowing the following testimony of witness Angus G. Wynne, to which plaintiff in error duly excepted, and exception was allowed. The testimony was as follows:

"Q. Will you read your letter into the record?
"MR. SCOTT—We object to that as immaterial, irrelevant and incompetent.
"THE COURT—The objection is overruled.

"Defendant's Exception No. 4.

"A. It is as follows: 'Kaufman, Texas, July 11th 1913, Meador & Davis, Dallas, Texas. Dear Sirs: In re Sowders vs. Elmo Rock Company. Our client is becoming very impatient about his money in the above case, and is punching us all the time. If you will rush the matter up we will appreciate it. Very truly, Wynne & Wynne, by Angus G. Wynne.' To which John Davis replied on the bottom of the same sheet of paper: 'Mr. Wynne: We are again to-day writing to our people to let the money come forward on this. What has become of the Elmo Rock Company business and property? Yours very truly, Meador & Davis, by John Davis."

(See Record, pp. 91 and 92.)

IV.

The Court erred in allowing the following testimony of Angus G. Wynne, to which plaintiff in error

duly excepted, and exception was allowed. Testimony was as follows:

"Q. Read that letter into the record.

"MR. SCOTT—We object to that on the ground that no proper foundation is shown. Mr. Davis is shown to be the attorney for the Elmo Rock Company. There is no proof that he is our attorney, or that he is authorized to bind us.

"THE COURT—So far as that is concerned, they may not be able to prove all the facts by one witness, but it is not at all [83—5] incompetent if they show that Davis was representing, in fact, the defendant here, rather than the nominal defendant in that action. If they fail to show that, them, of course, you can renew your objection. The objection is overruled.

"Defendant's Exception No. 5.

"A. It says: 'Dallas, Texas, July 21st, 1913. Messrs. Wynne & Wynne, Wills Point, Texas. Dear Sirs: Referring to the case of Sowders vs. Elmo Rock Company, beg to advise that we have just received a letter from the Pacific Coast Casualty Company, in which they say you must collect your judgment out of the Elmo Rock Company and that then they will deal with the Elmo Rock Company. We would suggest that you had better obtain execution, if necessary, at once and proceed with the matter, as our client has flatly refused to make payment of this judgment at this time. We are advising Messrs. Dashiell, Crumbaugh & Coon of this condition. Very truly yours, Meador & Davis, by John Davis.'"

(See Record, pp. 92 and 93).

V.

The Court erred in refusing to strike out a portion of the testimony of witness Angus G. Wynne, to which plaintiff in error duly excepted, and exception was allowed:

"A. Mr. Sowders and ourselves assigned together with the First State Bank at Terrell, I believe, our interest in this judgment to the General Bonding & Casualty Insurance Company.

"MR. SCOTT—We move that the latter part of the answer go out as immaterial, irrelevant and incompetent, and not within the issues of the case.

"THE COURT—Oh, I don't think that does any harm. Proceed.

"Defendant's Exception No. 6."

(See Record, pp. 93 and 94, Assignment of Error No. IV.)

VI.

The Court erred in refusing to strike out a portion of the testimony of witness Angus G. Wynne, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Who paid the money?

"A. I think that the check was signed by the General Bonding & Casualty Insurance Company, and to them I think we transferred the judgment.

"MR. SCOTT—I move that the latter portion of the answer be stricken out as immaterial, irrele-

vant and incompetent, as to the transfer of the judgment.

"THE COURT—It is a part of the cross-examination.

"MR. SCOTT—That is true, your Honor, but not brought out in reply to our question 'Who paid the mnoey?'

"THE COURT—The motion is denied.

"Defendant's Exception No. 7."

(See Record, pp. 97-98.)

VII.

The Court erred in allowing the following testimony of witness C. M. Crumbaugh, to which plaintiff in error duly excepted, and exception was allowed. The testimony was as follows:

"Q. Please state what you know about the proceedings connected [90—12] with the payment of this judgment in so far as Elmo Rock Company and its receiver were concerned.

"MR. SCOTT—We object to that on the ground that the record is the best evidence.

"THE COURT—The objection is overruled. It would not necessarily be the record.

"Defendant's Exception No. 9.

"A. After the judgment was rendered in the District Court, the case was duly appealed and finally a writ of error denied, I believe, by the Supreme Court, and execution was issued by the plaintiff in the case and levied on all of the property of the Elmo Rock Company, covering the

land and all the personal property. I did not discover that that execution had been issued until I noticed that it had been posted, and I think the land was to be sold—I think perhaps it was about only two or three days before the land was to be sold when I first discovered that the property had been seized, and in order to keep the assets of the corporation from being used for the purpose of paying off this indebtedness, I applied at once to the District Court for a receivership and had all of the property put in the hands of a receiver and stopped the execution.

"MR. SCOTT—We move to strike out the portion of the answer which deals with matters of record, as not the best evidence.

"THE COURT—These are matters that are entirely within the personal knowledge of an attorney; he is not stating the contents of a record at all. He is stating steps that were taken. Motion denied.

"Defendant's Exception No. 10." [91—13]

(See Record, pp. 100 to 102, Assignment of Error No. V.)

VIII.

The Court erred in allowing the following testimony of C. M. Crumbaugh, to which plaintiff in error duly excepted, and exception was allowed. The testimony was as follows:

(By MR. LOCKE.)

"Q. In the conference that took place in the court between yourself and Mr. Cosnahan and Judge Hawkins, it was requested and understood

by all the parties that the surety company was to pay this judgment in behalf of the Elmo Rock Company, because it was surety on the supersedeas bond, and that it desired the transfer of the policy in consideration of such payment? [94—16]

"MR. SCOTT—We object to that on the ground that it is not redirect examination, and further, that it is immaterial, irrelevant and incompetent; and more particularly, if your Honor please, upon this ground, that the assignment of this policy we claim cannot be the basis of an action against this defendant for the reason that the policy has never been performed—by the terms of the policy requiring payment by the assured—was never performed prior to the assignment, that the assignee has never acted under the policy, that the assignee of the policy made its payment a considerable time before the policy was assigned to it, and in making the payment was—so far as this defendant is concerned—purely a volunteer. We therefore object to that evidence.

"THE COURT—The objection is overruled.

"Defendant's Exception No. 11.

"A. Yes, sir, that was the understanding."

(See Record, pp. 105-106, Assignment of Error No. VII.)

IX.

The Court erred in allowing the following testimony of witness William L. Leeds, and refusing to strike out the same, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. What, if anything, within your knowledge, was done with reference to the making of a supersedeas appeal bond in that case?

"A. We had the bond made by the General Bonding & Casualty Company of Dallas after securing an indemnity bond from the Pacific Coast Casualty Company through the attorneys, Meador & Davis.

"MR. SCOTT—I move that the latter part of the answer go out, 'after securing an indemnity bond from the Pacific Coast Casualty Company through the Attorneys, Meador & Davis.' Meador & Davis appears to be the name of a firm of attorneys at law who represent the defendant. There is no authority shown.

"THE COURT—That authority can be shown by the acts of the parties.

"MR. SCOTT—It has not be shown.

"THE COURT—I say it may be shown by this very method. [103—25] If it appears thereafter that no objection was ever taken to what they did in the matter, the jury has the right to infer authority. Objection overruled. . . . Now, Mr. Scott, I see what your suggestion is as to the statement of the witness that they secured the indemnity from the Pacific Coast Casualty Company through Meador & Davis.

"MR. SCOTT—Yes, your Honor.

"THE COURT—I would not regard that as proof of authority.

"MR. LOCKE—We simply prove that to show the connection of the indemnity bond with the case.

"THE COURT—Yes. Motion denied.

"Defendant's Exception No. 13."

(See Record, pp. 115-116, Assignment of Error No. VIII.)

X.

The Court erred in allowing and refusing to strike out the following testimony of William L. Leeds, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Did you inform the Terrell people, your agents, or the Galveston agents, about the action that you had taken in reference to this bond?

"A. I think that we were instructed, or we were authorized by J. F. Seinsheimer & Company, at Galveston, to have the bond made for the Pacific Coast Casualty Company. Of course I am not positive of that, as I would have to refer to the files to see, but my impression now is that we were authorized by J. F. Seinsheimer & Company, of Galveston, to have the bond executed.

"MR. SCOTT—That we move to go out as merely the conjecture of the witness, and not the best evidence.

"THE COURT—Motion denied.

"Defendant's Exception No. 14."

(See Record, pp. 119-120, Assignment of Error No. IX.)

XI.

The Court erred in refusing to strike out certain testimony of witness John B. Stephenson, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Please state as nearly as you can remember [108—30] them, the negotiations that led up to the

making of that bond. Give the history of the transaction.

"MR. SCOTT—We desire to object on the ground that no proper foundation has been laid relative to the transaction by Mr. Davis in that behalf. My objection may be anticipating the answer.

"THE COURT—Yes, the question is entirely proper. The answer may develop something that you may object to.

"Defendant's Exception No. 15.

"A. Mr. Davis, of the firm of Meador & Davis, telephoned us that he would like to have us execute the bond as surety, and he asked me if we would be in the office and discuss the matter with him. On that day, or the next day—perhaps it was the next day,—Davis came over to the office with the form of bond he wanted executed, and stated that there would be no liability to our company, that the case would be taken care of in the event it was affirmed, and under those representations we signed the bond.

"MR. SCOTT—We move that the answer go out as immaterial, irrelevant and incompetent, no proper foundation for the introduction of such evidence being laid, it not being shown that Mr. Davis was anything other than representing the Pacific Coast Casualty Company in the defense of this damage suit, and as such attorney at law I think the rule of law is well settled that he has no authority to bind his client in the matter of entering into an agreement for an appeal bond.

"THE COURT—Motion denied. [109—31]

"Defendant's Exception No. 16."

(See Record, pp. 121-122, Assignment of Error No. X.)

XII.

The Court erred in allowing the following testimony of John B. Stephenson, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. In whose behalf did Davis represent himself to be acting in applying to you for the execution of this supersedeas bond?

"MR. SCOTT—We make the same objection to that, your Honor.

"THE COURT—You understand you cannot prove an agency by the declarations of the agent.

"MR. LOCKE—Of course not. It is simply one of the circumstances.

"THE COURT—I think that it is admissible as a part of the transaction. I will let it stand.

"Defendant's Exception No. 17.

"A. In behalf of the Pacific Coast Casualty Company." [110—32]

(See Record, p. 123, Assignment of Error No. XI.)

XIII.

The Court erred in allowing the following testimony of John B. Stephenson, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Are you familiar with the usages and practices at Dallas, and in the State of Texas,

with regard to the procurement by attorneys at law of the execution by surety companies of appeal bonds for their clients?

"A. Yes, sir.

"Q. What is the practice in that regard?

"MR. SCOTT—We object to that as immaterial, irrelevant and incompetent, not binding upon the defendant in any manner.

"THE COURT—Let it go in.

"Defendant's Exception No. 18.

"A. Such matters are usually taken up by us with the company's attorney. I don't believe I have ever executed one where the company took the matter up with us direct."

(See Record, pp. 123-124, Assignment of Error No. XII.)

XIV.

The Court erred in allowing the following testimony of John B. Stephenson, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Please state whether the usage you have described as obtaining in the office of your own company is within your knowledge the general usage obtaining in the office of other insurance companies in this locality?

"MR. SCOTT—Same objections, that it is immaterial, irrelevant and incompetent, not binding upon the defendant in any manner.

"THE COURT—Objection overruled.

"Defendant's Exception No. 19.

"A. So far as I have any knowledge, it is."

(See Record, p. 124, Assignment of Error No. XIII.)

XV.

The Court erred in allowing the following testimony of John B. Stephenson, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Please state what, if any, information you had at the time of executing this appeal bond concerning the extent and nature of the authority of Mr. Davis to represent the [111—33] Pacific Coast Casualty Company in the matter of getting a supersedeas appeal bond.

"MR. SCOTT—We object to that as immaterial, irrelevant and incompetent.

"THE COURT—Let it go in.

"A. We understood he had full authority to act for the Pacific Coast Casualty Company in the matter of procuring a surety on the proposed appeal bond.

"MR. SCOTT—We move that that go out as not responsive to the question. It does not state the information, it simply states his conclusion.

"THE COURT—I will hear the balance of it and see what it shows.

"Defendant's Exception No. 21.

(See Record, pp. 124-125, Assignment of Error No. XIV.)

XVI.

The Court erred in refusing to strike out a portion of testimony of witness John B. Stephenson, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Was the matter of his authority discussed between you?

"MR. SCOTT—Objected to as immaterial, irrelevant and incompetent, and no foundation laid.

"THE COURT—The objection is overruled. If it should appear that thereafter the case took a course where the defendant here was bound to know, or it was called to its attention that such a contract had been executed on its behalf by Attorney Davis and they made no objection, or acted upon it as though he [112—34] was authorized, that would be, in law, a ratification, and if they did not do anything of the kind, then they cannot be bound by his mere declaration that he acted in certain relations.

"Defendant's Exception No. 22.

"A. Our general information was that the Pacific Coast Casualty Company had been represented by Meador & Davis, and that they had power of attorney to execute any paper for them. The exact amount of their power of attorney we did not know, and did not know what their limit was. We supposed they had full authority in this particular case, or in any other case. We had made other bonds for them, and they had never questioned their power of attorney."

(Record, pp. 125-126, Assignment of Error XV.)

XVII.

The Court erred in allowing the following testimony of John B. Stephenson, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Please state what, if any, information you had at the time of executing this appeal bond concerning the extent and nature of the authority of Mr. Davis to represent the [111—33] Pacific Coast Casualty Company in the matter of getting a supersedeas appeal bond.

"MR. SCOTT—We object to that as immaterial, irrelevant and incompetent.

"THE COURT—Let it go in.

"Defendant's Exception No. 20.

"A. We understood he had full authority to act for the Pacific Coast Casualty Company in the matter of procuring a surety on the proposed appeal bond."

(Record, pp. 124, 125.)

XVIII.

The Court erred in admitting in evidence copy of the contract of indemnity referred to as plaintiff's exhibit "D," to which plaintiff in error duly excepted, and exception was allowed. The proceedings in that respect were as follows:

"Thereupon plaintiff offered in evidence the contract of indemnity heretofore referred to in said depositions as Plaintiff's Exhibit 'D.'

"MR. SCOTT—We object to the introduction of

that paper upon the ground that it affirmatively appears that Mr. Davis did not have authority to sign that as attorney in fact of the Pacific Coast Casualty Company.

"THE COURT—I will let that go in subject to the objection.

"Defendant's Exception No. 23.

"The said Plaintiff's Exhibit 'D' is in words and figures following, to wit:

" 'The State of Texas,

" 'County of Dallas.

" 'Whereas, heretofore, to wit, on the —— day of ————, the Pacific Coast Casualty Company of San Francisco, California, issued to the Elmo Rock Company of Terrell, Texas, an employer's liability policy, insuring said rock company against loss and expense arising from claims upon the assured for damages on account of bodily injuries suffered or alleged to have been suffered during the period of said policy by any employee of the assured by reason of the prosecution of the work described in said policy; and,

" 'Whereas, during the period of said policy, one of the employees of said assured, to wit, J. B. Sowders, was injured by reason of the prosecution of the work described in said policy; and, whereas the said J. B. Sowders brought suit against said rock company and recovered a judgment of $5,000.00 in the District Court of Kaufman County, Texas; and, whereas the said Pacific Coast Casualty Company believes that said judgment is erroneous and that no liability exists by reason of said injury sustained by said Sowders, and has employed John Davis, an attorney at law, Dallas, Texas, to perfect an appeal from said judgment and prosecute the same to effect; and, whereas [130—52] a supersedeas bond

of $11,000.00 is required to perfect said appeal, and the General Bonding & Casualty Insurance Company of Dallas, Texas, in consideration of this agreement and other considerations, has agreed to execute said supersedeas bond as surety; Now,

" 'Therefore, in consideration of said agreement and other good and valuable considerations, the said Pacific Coast Casualty Company does hereby agree and obligate and bind itself to indemnify, and keep indemnified, the said General Bonding & Casualty Insurance Company against any and all loss, costs, charges, counsel fees, damages and expenses whatever, which said bonding company shall or may sustain or be put to at any time by reason or in consequence of having executed said supersedeas bond as surety.

" 'Witness its hand, this 6th day of August, 1912.

" 'PACIFIC COAST CASUALTY COMPANY,

" 'By JOHN DAVIS,

" 'Its Attorney at Law and in Fact.' "

(Record, pp. 149 to 151, Assignment of Error No. XVI.)

XIX.

The Court erred in allowing in evidence the alleged assignment of the insurance policy to which plaintiff in error duly excepted, and exception was allowed. The proceedings in that respect were as follows:

Thereupon Mr. Locke offered in evidence the assignment of the policy.

"MR. SCOTT—I would like to make a formal objection to that on the ground that the policy, by

the terms thereof, is not assignable, and on the ground that this assignment cannot be made the basis of a cause of action against this defendant for the reason that no payments have been made by the assignees under the terms of this assignment or under the terms of the policy, but that the payment of the judgment by the assignee was a payment made prior to the assignment made on October 22 of this year, whereas the assignment was of November 4, 1913, and such payment is as to the Pacific Coast Casualty Company the payment of a volunteer; that the instrument is immaterial, irrelevant and incompetent as to the Pacific Coast Casualty Company; that furthermore, the assignment appears from the evidence of the plaintiff to have been made in pursuance of a scheme to enable the assured by the assurance and the collusion of th General Bonding Company to avoid and escape its obligation under the policy to make the payment within a certain specified time after the judgment became final. [131—53]

"THE COURT—How is that?

"MR. SCOTT—It seems that from the evidence as now disclosed in the case, that a stockholder of the assured company, in order to prevent the assured paying the judgment, as according to the terms of its policy it was required to do, threw it into some sort of a proceeding whereby it had a receiver appointed and is now holding its property in *statu quo,* allowing the bonding company to make the payment while it allows the receiver to preserve its property intact until this suit is disposed of.

"THE COURT—There is not enough evidence to show collusion thus far; what you may show hereafter, I cannot tell.

"MR. LOCKE—And there is no pleading of collusion.

"THE COURT—No, there is no pleading of collusion. I will permit it to go in.

"Said assignment was thereupon introduced in evidence. The assignment is set forth as exhibit 'J,' attached to plaintiff's complaint, and reference is hereby made to said exhibit, and the same is hereby made a part hereof.

"Defendant's exception No. 24."

(Record, pp. 151 to 153, Assignment of Error No. XVI.)

XX.

The Court erred in denying the motion of plaintiff in error, made after defendant in error rested its case, for nonsuit, which motion was as follows:

Motion for a Nonsuit

"MR. SCOTT—The defendant at this time desires to move your Honor for a nonsuit in this case upon the following grounds:

"That it appears from the evidence affirmatively that Mr. Davis was not authorized to sign an indemnity agreement or to secure a bond on behalf of this defendant, the Pacific Coast Casualty Company.

"That it affirmatively appears from the evidence that this lack of authority was brought to the notice of the General Bonding Company at the time the bond was applied for by Mr. Davis and issued, on the ground that Mr. Davis was not the agent of the defendant, the Pacific Coast Casualty Company, in that transaction; on the further ground that the assignment or purported assignment of the policy of insurance to the Gen-

eral Bonding Company is invalid and void, that said policy of insurance was not assignable at that [149—71] time, that said policy of insurance is a policy of indemnity against loss by the assured, the Elmo Rock Company; that the Elmo Rock Company has never suffered loss has been called upon to pay and has never paid anything in connection with the case of Sowders vs. Elmo Rock Company.

"Upon the further ground that it appears affirmatively that the Elmo Rock Company was unable to pay the judgment and was insolvent. On the further ground that it appears affirmatively that the General Bonding Company and the Elmo Rock Company co-operated in an effort whereby the Elmo Rock Company did not pay and was not called upon to pay the judgment in the case of Sowders vs. The Elmo Rock Company. That said action taken at the instance of the Elmo Rock Company and with the co-operation of the plaintiff herein was designed specifically to deceive this defendant.

"If your Honor please, I desire briefly to state our views in reference to this case and to this motion——

"THE COURT—I do not think I would expend much time in presenting it at this time; I should not be disposed to grant the motion without further consideration. The better way would be to submit it and take a formal ruling and proceed with the case.

"MR. SCOTT—We have no evidence to submit. We rest here.

"THE COURT—You submit your cause then, Mr. Scott, on the motion for nonsuit?

"MR. SCOTT—I do, your Honor.

"Thereupon the cause was submitted on briefs to be filed, 20, 20 and 10 days; thereafter upon the

filing of said briefs said motion for nonsuit was denied.

"Defendant's exception No. 25."

(Record, pp. 183-185, Assignment of Error No. 211.)

The plaintiff in error now specifies the particulars in which the evidence was and is insufficient to justify the decision of the Court, as follows:

I.

Under this, the first specification, defendant claims [176] that the evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Miller-Stemmons Company procured an indemnity bond from the defendant, through attorneys Meador & Davis; that the evidence shows that Meador & Davis were not the attorneys in fact of defendant and were not authorized to give an indemnity bond on behalf of the defendant.

II.

The evidence is and was insufficient and there is no evidence to sustain the finding of the Court that Miller-Stemmons Company or Meador & Davis were authorized by J. B. Seinsheimer & Company to have an indemnity bond executed for the reason that the evidence shows that the defendant declined to authorize either Miller-Stemmons Company or Meador & Davis to furnish an indemnity bond, and that the

evidence further shows that J. F. Seinsheimer & Company were not authorized to issue indemnity bonds on behalf of the defendant casualty company.

III.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that as an inducement to the issuance of the supersedeas appeal bond, Davis gave to plaintiff an indemnity contract, set forth in said findings, for the reason that the evidence shows that said alleged indemnity contract was not given as an inducement to the issuance of said supesedeas bond, but was given by Davis subsequent to the issuance of said bond.

IV.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that John Davis was the attorney in fact of the defendant, for the reason that [177] the evidence shows that said John Davis never had any authority other than that of an attorney at law, employed by defendant to defend Elmo Rock Company.

V.

The evidence was and is insufficient and there is no evidence to sustain the finding that Stephenson was not shown the defendant company's letter of June 28th, 1912, to its attorneys for the reason that the

evidence shows that said letter was delivered to Stephenson by Davis at the time that Davis made application for the supersedeas bond and said letter was held by Stephenson until the taking of his deposition in this case.

VI.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Stephenson was not in any way made aware of any limitations upon the authority of Davis, for the reason that the evidence shows that Davis told Stephenson he had no authority to execute an indemnity contract, and said Davis delivered to said Stephenson at the time of executing the indemnity contract dated August 6th, 1912, the letter dated June 28th, 1912, from defendant, denying him authority to procure the supersedeas bond.

VII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Stephenson dealt with Davis in the supposition that his authority was that which was usual in such cases, for the reason that the evidence does not show that Stephenson dealt with Davis under any misapprehension as to his authority, nor does the evidence show that it was usual for an attorney at law to have authority to [178] procure supersedeas bonds and execute indemnity contracts in their clients' names.

VIII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that authority to execute the indemnity contract was apparently possessed by Davis, for the reason that the evidence shows that Davis had no apparent authority to execute an indemnity contract on behalf of this defendant.

IX.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Leeds was an agent of this defendant, for the reason that the evidence shows that said Leeds was an insurance broker and acted in the premises without any authority from this defendant, and as an agent of plaintiff, if of either of the parties.

X.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that this defendant knew of the execution by John Davis of the indemnity contract dated August 6th, 1912, at any time prior to the commencement of the above-entitled action, for the reason that the evidence shows that John Davis executed said contract without authority from the defendant, and the evidence does not show that defendant even knew of the execution of the same.

XI.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that defendant ratified the giving of said indemnity contract dated August 6th, [179] 1912, by John Davis, as attorney in fact of defendant, for the reason that the evidence shows that this defendant never knew of the making of said contract prior to the commencement of this action, and that this defendant paid the premium on the supersedeas bond merely as a part of the expenses arising from claims upon the assured, which expenses were embraced within the terms of the policy of Employer's Liability Insurance Number ME 36,696.

XII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that plaintiff paid the judgment rendered against plaintiff and Elmo Rock Company at the special request of the Receiver of Elmo Rock Company, for the reason that the evidence shows that plaintiff paid said judgment after writ of execution duly issued and under compulsion of law.

XIII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that the Receiver of Elmo Rock Company assigned to

plaintiff the employer's liability policy issued by the defendant, for the reason that said policy was one insuring Elmo Rock Company against loss on account of bodily injuries suffered by its employee, and said policy was not assignable by Elmo Rock Company until loss had been sustained by said company.

XIV.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that the property of Elmo Rock Company levied upon by the sheriff and held by the Receiver was worth Nineteen Thousand ($19,000) Dollars [180].

XV.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Elmo Rock Company was solvent and able to pay the judgment recovered by Sowders at the time execution was levied upon the property of said Elmo Rock Company, for the reason that the evidence shows that said Elmo Rock Company was insolvent at said time.

XVI.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Elmo Rock Company sustained loss or expense in the action entitled "Sowders versus Elmo Rock Company," for the reason that the evidence shows that

the Elmo Rock Company incurred no expense and suffered no loss in said action.

XVII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that loss or expense was actually sustained and paid in satisfaction of a final judgment by Elmo Rock Company within ninety days from the date of said judgment, and after trial of the issue, for the reason that the evidence shows that said Elmo Rock Company did not sustain and pay any loss or expense in satisfaction of any final judgment, and the evidence shows that no such loss or expense was paid within ninety days from the date of said judgment and after trial of the issue.

XVIII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Miller-Stemmons Company were acting under J. F. Seinsheimer & Company of Galveston, Texas, defendant's general agents, for the reason that the evidence shows that Miller-Stemmons Company were merely [181] solicitors of insurance and that they were not the agents of defendant.

XIX.

The evidence is and was insufficient and there is no evidence to sustain the finding of the Court that it was the duty of defendant to furnish the supersedeas bond in taking an appeal from the judgment in the action of Sowders versus Elmo Rock Company for the reason that the policy of insurance issued by defendant does not provide that defendant would furnish said bond and it does not require defendant to pay or to guarantee the payment of the judgment in an action for personal injuries until said judgment has become final and has been paid by the assured.

ARGUMENT.

The questions of law suggested by this record are few in number and may be very briefly stated.

In its complaint plaintiff below sought to recover from the Pacific Coast Casualty Company the amounts it had expended by reason of giving the supersedeas bond on appeal and it based its hope of recovery apparently upon three different theories.

First: That it had paid and discharged judgment rendered in favor of Sowders and against the Elmo Rock Company, a corporation, and that in making such payment it took an assignment from Sowders of all right of action which he had as judgment creditor against the Elmo Rock Company.

It will be noted, however, that the defendant in error did not pay and discharge the judgment rendered in favor of Sowders against the Elmo Rock Company, but it took an assignment of the rights of Sowders against the Elmo Rock Company (Record, pp. 112, 113).

The judgment was not paid and discharged, as a matter of fact; but it was purchased by the defendant in error, and is now held as a live and subsisting claim against the Elmo Rock Company. This is confirmed by the assignment from the Elmo Rock Company to the General Bonding & Casualty Insurance Company, as will be noted from reading "Exhibit J" on pages 34 to 37 of the Record; which Exhibit recites that the General Bonding Company, by reason of its payment, has become subrogated to the rights of the Elmo Rock Company, and further recites that the assignment of the policy hereinafter referred to is made without prejudice to any right which said General Bonding & Casualty Insurance Company may have against the Elmo Rock Company for its reimbursement, otherwise than by means of said policy, for the amount expended by it in the payment of said judgment, interest and costs (Record, pp. 34 and 36). The assignment of the judgment recovered by Sowders was signed by himself and the First State Bank of Terrell and Wynne & Wynne.

Second: That Davis was the agent of the plaintiff in error or was held out as the agent of the plaintiff

in error, and that as such agent an indemnity agreement was signed by him, upon which plaintiff in error should be held liable.

The third theory is that plaintiff is an assignee of a policy of insurance issued by plaintiff in error to the Elmo Rock Company, and that as such assignee, having paid the loss, it is entitled to recover.

On the first theory, namely, that the defendant in error is subrogated to the rights, if any, which Sowders may have against the Elmo Rock Company and, therefore, may recover from the plaintiff in error, we respectfully submit that the defendant in error should have been nonsuited in the Court below.

The only right that Sowders had against the Elmo Rock Company was to have a writ of execution issue against the Elmo Rock Company and to see that the same was satisfied from its assets. These rights were neither increased nor diminished by an assignment of the judgment recovered by Sowders.

Where a surety has discharged the obligation of its principal, it is subrogated to the rights of the creditor who may have a judgment against the principal. Its rights are neither greater nor less than those of the creditor.

If the surety has paid the judgment which has been rendered against the principal, such surety may proceed to take out execution under such judgment and pay the same. The surety would succeed to

any rights which the creditor may have against the principal.

If collateral has been pledged or if the creditor has the same under attachment or under levy of execution, the surety may take the same for his protection. He is, as it were, put in the shoes of the creditor.

The creditor in this instance was Sowders, the injured employee who recovered a judgment against the Elmo Rock Company. Unquestionably the plaintiff herein would have a right to enforce the judgment obtained by Sowders against the Elmo Rock Company. The authorities are uniform, however, to the effect that under such a policy as the one in question in this case, the injured employee could not recover directly from this plaintiff in error upon the policy of insurance issued by it; and, therefore, it must logically follow that a surety discharging the judgment and merely subrogated to the rights of the plaintiff in the original action for personal injuries, is in the same situation as such plaintiff, is subrogated to his rights, and could not recover directly upon the policy of insurance any more than the plaintiff in the original action could have done.

For the general doctrine of subrogation we beg leave to refer to Brandt on Suretyship and Guaranty, Volume 1, beginning at Section 324. An examination of the text of this learned author and the authorities cited therein shows that the General Bonding &

Casualty Insurance Company, as surety, while it succeeded to all the rights of Sowders, the judgment creditor, did not, as such surety, succeed to any inchoate rights, if any, that the Elmo Rock Company might have had against this defendant.

The policy issued by this Company provided that the Pacific Coast Casualty Company would indemnify the Elmo Rock Company against loss sustained and paid by said Company in the Sowders case; yet it affirmatively appears from the record that the Elmo Rock Company never did sustain any loss whatsoever and never did pay any loss.

A judgment was rendered against the Elmo Rock Company, but by resort to receivership the Elmo Rock Company escaped the necessity of paying that judgment and the defendant in error was called upon to pay, and finally did pay, the judgment with interest and costs by reason of the fact that it had issued a supersedeas bond.

The Elmo Rock Company still evades the payment of said judgment. Therefore, the very contingency upon which payment by plaintiff in error was predicated has not yet occurred, the plaintiff in error's agreement being to pay when the Elmo Rock Company, its assured, had paid, and said assured having made no payment, the plaintiff in error is not to date called upon to make such payment.

The matter may be illustrated as follows: A being a man of some means goes to B and says to him,

"If you will give your note to a certain bank and borrow five thousand dollars thereon I will guarantee to repay to you (B) any loss that you may sustain upon that note." B, the maker of the note, then goes to C and asks C, for a valuable consideration, to become surety thereon. C does so. Thereafter, the note having become due and the bank suing thereon, the surety, by reason of the insolvency of B, is obliged to pay the note. B, the maker of the note, has naturally suffered no loss. C, the surety upon the note, has incurred a loss and paid the same. Manifestly, C cannot look to A for reimbursement, as A's contract was simply to repay to B any sums of money that B had expended, and B has expended none. Under the doctrine of subrogation the surety, C, having paid the loss, might look to B for reimbursement, but until B had actually paid the note or a portion thereof, neither he nor the surety could look to A, the original indemnitor, there being no privity of contract between the parties and the contract between A and B being one based upon a condition which is not yet fulfilled, and he cannot be held liable.

Any rights to which plaintiff below may have become subrogated upon the payment by it of the Sowders judgment were such rights as Sowders had against the Elmo Rock Company. They were not the rights which the Elmo Rock Company might

have had against this plaintiff in error, had the said Elmo Rock Company itself paid the loss.

This brings us to what we believe is the chief point in this case, namely, that no right of action has ever arisen against defendant under the policy of insurance issued by it for the reason that the assured has never sustained a loss.

An inspection of the policy, a copy of which is set forth in the complaint herein, shows that it insured the Elmo Rock Company against loss and expense sustained and paid. Such a policy is under the authorities merely an agreement to indemnify the specified person or corporation named as the assured. Liability arises under such policy only when the assured has suffered. Among the cases on this subject are the following:

O'Connell vs. *New York, N. H. and H. R. R. Co.,* 187 Mass., 272, 72 N. E., 979,

which holds that the payment of the judgment by the policy holder is a condition precedent to the liability of the Company, the Court saying:

> "If, therefore, we assume, in favor of the plaintiff, without making a decision to that effect, that, after the defendant surety company had taken on itself the defense of the action, it was precluded from afterwards taking the position that the case was not one covered by the policy, *still the plaintiff has not made out a case here, because he has not paid the judgment entered in the action defended by the surety company.* There is nothing in the

finding of the Court which amounts to a waiver of this condition precedent to the defendant surety company's liability. To create a waiver, there must be some act inconsistent with the rights waived. There is nothing found here, or in the evidence on which that finding was made, inconsistent with a determination from the beginning on the part of the surety company to insist that, when the time came for payment under the policy, payment should be made in accordance with the terms of the policy, and on no other terms; that is to say, to pay when O'Connell had paid the judgment in the action which the Company had tried, and which for that reason it was estopped to say was not an action fixing its obligation under the policy."

So in *Connelly* vs. *Bolster,* 187 Mass., 266, 72 N. E., 981, where the Court says:

"Whether the Insurance Company is bound to pay the judgment depends upon the terms of its agreement to indemnify the assured against loss, and the eighth clause, in terms, provides that no action shall lie for 'any loss under its policy' unless brought by the assured 'to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue'. In the case at bar, Bell has not paid the judgment recovered by the plaintiff, and therefore has no claim against the insurance company. Similar policies have received the same construction in *Frye* vs. *Gas & Electric Co.,* 97 Me., 241, 54 Atl., 395, 59 L. R. A., 444, 94 Am. St. Rep., 500; *Cushman* vs. *Carbondale Fuel Co.,* 122 Iowa, 656, 98 N. W., 509 It was also adopted in the case of *Travelers Ins. Co.* vs. *Moses,* 63 N. J. Eq., 260, 49 Atl., 720, 92 Am. St. Rep., 663, where it was held that an assignment of the property of the insured in bankruptcy was payment."

The rule is very forcibly stated in the case of *Finley* vs. *U. S. Casualty Co.,* 113 Tenn., 587, 83 S. W. 2, where the Court says:

"There is a difference between the effect of a policy which insures directly against liability, and one that insures against loss or damage by reason of liability. Under contracts of the first description, the amount of the policy, up to the extent of the liability incurred by an employer on account of an accident to an employe, becomes, immediately upon the happening of the event on which the liability depends, and the giving of such notice as the policy provides for, an asset of the assured, which, in the absence of any provisions to the contrary in the policy, may be assigned by him, or taken for his debt, subject, of course, to the making of such proofs to perfect the demand as the policy may provide for. Under the policies of the second kind, to which the one before us belongs, the amount of the insurance does not become available until the assured has paid the loss, and is not even then available unless proper notice has been given as provided in the policy.

"The rules above stated will be found illustrated and discussed in the following authorities, viz.: As to the characteristics of the two kinds of contracts, respectively: *Anoka Lumber Co.* vs. *Fidelity & Casualty Co.* (Minn.) 65 N. W., 353 30 L. R. A., 692; *Fenton* vs. *F. & C. Co.* (Or.) 56 Pac., 1096, 48 L. R. A., 770; *Bain* vs. *Atkins* (Mass.), 63 N. E., 414, 57 L. R. A., 792, 92 Am. St. Rep., 411; *Frye, Admr.* vs. *Bath Gas Co.* (Me.), 54 Atl., 395, 59 L. R. A., 444, 94 Am. St. Rep., 400. As to notice: *London Guarantee Co.* vs. *Siwy* (Ind. App.) 66 N E., 481; *Travelers Ins. Co.* vs. *Myers* (Ohio), 57 N. E., 458, 49 L.

R. A., 760; *Smith & Dove Co.* vs. *Travelers Ins. Co.* (Mass.), 50 N. E., 516.

"Under neither class of these policies is the employe treated as in privity with the parties to the contract. Under each the contract is held to be one between the company and the master, and for the benefit of the latter.

"In *Anoka Lumber Co.* vs. *Fidelity & Casualty Co.* it is said: 'The defendant claims that it is not liable because the Nelson judgment (the judgment obtained by the employe against the assured) has not been paid by the plaintiff. If it be simply a contract of indemnity, then, under the decision of this Court in *Weller* vs. *Eames,* 15 Minn., 461 (Gil. 376), 2 Am. Rep., 150, the payment of the judgment is a condition precedent to the right of the plaintiff's recovery.'

"In *Fenton* vs. *Fidelity & Casualty Co.* it is said: 'There is a distinction made by the authorities between a contract of indemnity against liability for damages and a simple contract of indemnity against damages. In the former case it has very generally been held that an action may be brought, and a recovery had, as soon as the liability is legally imposed, while in the latter there is no cause of action until there is actual damage. *Jones* vs. *Childs,* 8 Nev., 121; 10 Am. & Eng. Enc. Law, 413; *Smith* vs. *Chicago & N. W. R. Co.,* 18 Wis., 21; *Thompson* vs. *Taylor,* 30 Wis., 73; *Locke* vs. *Homer,* 131 Mass., 93, 41 Am. Rep., 199; *Trinity Church* vs. *Higgins,* 48 N. Y., 532. * * * If, therefore the policy upon which this action is based is a mere contract of indemnity, the payment by the mill company of the liability incurred by it for the injuries of the plaintiff is a condition precedent to the right of recovery. If, on the other hand, the contract is one of indemnity against liability, a cause of action accrued thereunder as

soon as the liability of the mill company to the plaintiff attached.'

"In *Frye* vs. *Bath Gas & Elec. Co.,* wherein it appeared that the policy under examination was in practically the same language as the one before the Court, it was said: 'We are unable to perceive any ground upon which the bill can be sustained, and the relief prayed for granted. The contract of insurance was with the gas company to indemnify that company against loss from liability for damages on account of bodily injuries accidentally suffered by the employes, and caused by the negligence of the assured. The use of the word "indemnify" shows the object and nature of the contract. It was to reimburse or make whole the assured against loss on account of such liability. There can be no reimbursement when there has been no loss. The contract of insurance contains nothing to show that it was the object or intention of the contracting parties that the insurer should guaranty the gas company's liability for negligence to its employes. It was not a contract of insurance against liability, but of indemnity against loss by reason of liability. * * * The difference between a contract of indemnity and one to pay legal liabilities is that upon the former an action cannot be brought and recovery had until the liability is discharged, whereas upon the latter the cause of action is complete when the liability attaches. * * * The contract was one of indemnity only. It was not obtained by the gas company for the benefit of its employes, but for its own benefit exclusively—to reimburse it for any sum that the company might be obliged to pay and had paid on account of injuries sustained by employes through its negligence."

Second: The second theory is that plaintiff in

error should be held liable by reason of the indemnity agreement executed by Davis, the attorney at law employed by plaintiff in error to defend the Elmo Rock Company.

We feel that it is well settled that an attorney at law is not authorized, by reason of his employment as such, to execute a supersedeas bond on behalf of his employer.

The general authority of an attorney at law does not extend to executing an appeal bond or undertaking for his client.

Gordon vs. *Camp,* 2 Fla., 23;
Clark vs. *Courser,* 29 N. H., 170;
Ex parte Holbrook, 5 Cow. (N. Y.), 35;
Bowen vs. *Johnson,* 17 R. I., 779; 24 Atl., 830;
Murray vs. *Peckham,* 15 R. I., 297; 3 Atl., 662;
Coles vs. *Anderson,* 8 Humphr. (Tenn.), 489.

An attorney has no right, as such, either to execute a supersedeas bond without specific instructions or to agree to indemnify the surety executing such bond.

If he had the right to enter into an indemnity agreement, he certainly would have the right to execute the bond himself on behalf of his client. We believe the rule in this respect is well settled. See—

White vs. *Davidson,* 8 Md., 169; 63 Am. Dec., 699;

Narragaugus Land Proprietors vs. *Wentworth*, 36 Me., 399.

But in this case the right of Davis or of the firm of Meador & Davis to execute such an indemnity agreement or to furnish or obtain a supersedeas bond on behalf of the Pacific Coast Casualty Co. can hardly be said to be a matter of dispute. Davis was most expressly ordered not to procure such a bond.

This is shown by the letter dated June 28th, 1912, and set out in the record at page 141; where the Casualty Company through its attorney instructed Meador & Davis as follows: "Kindly proceed with the "appeal of this case, but you will understand that "we do not furnish a supersedeas bond staying "execution." And long before the so-called indemnity agreement was issued, the letter of July 30th, 1912, was dispatched and received; and in that letter Meador & Davis were informed by the Pacific Coast Casualty Company: "We endorse your action taken "in this matter and will ask you to proceed with "the appeal, but assured must furnish its own super- "sedeas bond. As Sinsheimer & Company are not "our agents any longer, we will ask you to kindly "communicate with us in connection with all cases "which you are handling in our behalf" (Record, p. 144).

The letter of instructions received by Meador & Davis was delivered by Mr. Davis to Stephenson,

the president of defendant in error (Record, pp. 134, 135, 136). Stephenson admits that he received that letter; he thinks he received it when the application for the bond was returned by Davis; but he admits that no application was ever sent by Davis to him (Record, p. 130); and the letter is produced from the papers in the case turned over by Stephenson to attorneys for the defendant in error (Record, p. 126). Stephenson does not recall having seen the letter until he went to examine the papers after there was trouble over the payment of the claim (Record, p. 126). Under the evidence submitted by defendant in error—and that is the only evidence presented in this case—there could be no question but that the indemnity agreement was unauthorized and defendant in error knew that it was unauthorized either at the time the bond was issued or shortly afterwards, when the communication which Davis had promised was received and the copy of the letter sent by plaintiff in error to Davis was placed in the files of the defendant in error. These are the facts of the case as disclosed by testimony presented by plaintiff below.

Suppose, however—and this is not the case at bar—that plaintiff below was not informed by Davis that his authority did not extend to the execution of indemnity agreements and did not extend to the furnishing of supersedeas bonds. Then, under well-settled authorities, defendant in error was charged

with knowledge and notice of the limitations placed upon the authority of Davis; which authority was, by the very nature of the case, in writing and which was admitted to be in writing according to the knowledge of Stephenson, the President of the corporation which is defendant in error. Stephenson himself testifies that he had information that Meador & Davis had power of attorney to execute any paper for plaintiff in error. He goes on to say, "The exact "amount of their power of attorney we did not know, "and did not know what their limit was" (Record, pp. 125, 126).

Where an individual is dealing with an agent knowing that said person with whom he is dealing is an agent of another, knowing that he has a power of attorney, knowing that, as in the case of one representing a corporation and executing agreements of indemnity for said corporation, said power of attorney should be in writing, and knowing, as is stated in the record, that the said power of attorney was written, the person so dealing with such agent is charged with knowledge of the contents of the power of attorney and is charged with the duty of ascertaining the extent of the authority possessed by such agent. He cannot safely rely upon the agent's statement of authority or upon the mere assumption that he has such authority.

Mussey vs. *Beecher,* 3 Cush. (Mass.), 511;

Reinforced Concrete Co. vs. *Boyes* (Mich.), 147 N. W., 577;

Deffenbaugh vs. *Jackson Paper Mfg. Co.,* 120 Mich., 242, 79 N. W., 197;

Clark vs. *Haupt,* 109 Mich, 212, 68 N. W., 231;

Gordeen vs. *Pearlman,* 91 N. Y. S., 420;

Hambro vs. *Burnand* (1903), 2 K. B. 399, (rev. on other grounds (1904), 2 K. B., 10);

Delta Lumber Co. vs. *Williams,* 73 Mich., 86, 40 N. W. 940;

Jonathan Mills Mfg. Co. vs. *Whitehurst,* 72 Fed., 496, 19 C. C. A., 130;

Wilson vs. *Shocklee,* 94 Ark., 301, 126 S. W. 832;

Latham vs. *Ft. Smith First Nat. Bank,* 92 Ark., 315, 122 S. W., 992;

Pease vs. *Fink,* 3 Cal. A., 371, 85 Pac., 657;

Phillip Carey Co. vs. *Thyson,* 39 D. C. App., 233;

Carter vs. *Pembroke Nat. Bank,* 11 Ga. A., 479, 75 S. E., 824;

Gore vs. *Canada Life Assur. Co.,* 119 Mich., 136, 77 N. W., 650;

Rice vs. *Grand Rapids Peninsular Club,* 52 Mich., 87, 17 N. W., 708;

Trull vs. *Hammond,* 71 Minn., 172, 73 N. W., 642;

Mathes vs. *Switzer Lumber Co.,* 173 Mo. A., 239, 158 S. W., 729;

Friedman vs. *Kelly,* 126 Mo. A., 279, 102 S. W., 1066;
Fitzgerald vs. *Kimball Bros. Co.,* 76 Nebr., 236, 107 N. W., 227;
MacLatchy vs. *Hannan,* 104 App. Div., 70, 93 N. Y. S., 282;
Saranac vs. *Groton Bridge, etc., Co.,* 55 App. Div., 134, 67 N. Y. S., 118;
Shull vs. *New Birdsall Co.,* 15 S. D., 8, 86 N. W., 654;
O'Daniel vs. *Streeby,* 77 Wash., 414, 137 Pac., 1025;

Now, if the person makes no inquiry, but chooses to rely on the agent's statement, then he is charged with knowledge of the limit placed upon the agent's authority and cannot complain.

Molloy vs. *Whitehall Portland Cement Co.,* 116 App. Div., 839, 102 N. Y. S., 363;
Sloan vs. *Brown,* 228 Pa., 495, 77 A., 821, 139 Am. S. R., 1019;
Nova Scotia Bank vs. *Richards,* 33 N. B., 412 (aff. 26 Can. S. C., 381).

Such is the well established rule in this jurisdiction.

Davis vs. *Trachsler,* 3 Cal. App., 554;
Solari vs. *Snow,* 101 Cal., 387;
McDonald vs. *Cool,* 134 Cal., 502;
Robinson vs. *American Fish etc. Co.,* 17 Cal. App., 212.

Third: The third theory upon which plaintiff below appears to rely is that said plaintiff, defendant in error herein, is an assignee of a policy of insurance issued by the defendant to the Elmo Rock Company, and that as such assignee, having paid the loss, it is entitled to recover. This is, we believe, the gist of the contention made by defendant in error.

The contract of plaintiff in error is, however, merely to pay when the assured had made payment. It was only when the assured had satisfied a judgment within ninety days after said judgment became final that the plaintiff in error was called upon or could be called upon under its policy to pay the amount of a judgment to the assured.

> "Where the policy requires payment of the loss by the assured, the Policy is not assignable until the assured has paid the loss."
>
> *Finley* vs. *Casualty Co.,* 113 Tenn., 587, 83 S. W., 2.

> "Where the obligation is to indemnify against a loss actually sustained and paid in satisfaction of a judgment no recovery can be had against the insurer where the judgment against the assured is not paid."
>
> *Cushman* vs. *Fuel Co.,* 122 Iowa, 656, 98 N. W., 509;
>
> *Carter* vs. *Ins. Co.,* 76 Kan, 275, 91 Pac., 178, 11 L. R. A. (N. S.), 1155;
>
> *O'Connell* vs. *R. Co.,* 187 Mass., 272, 72 N. E., 979;

Kennedy vs. *Fidelity etc. Co.,* 100 Minn., 1, 110 N. W. 97, 117 Am. St. Rep., 658, 9 L. R. A. (N. S.), 478;

R. Co. vs. *Waymire* (*Tex. Civ. App.*), 89 S. W., 452;

Stenborn vs. *Engine Co.,* 137 Wisc., 564, 119 N. W., 308, 20 L. R. A. (N. S.), 956.

"Under policies that insure against loss or damage by reason of liability, the amount of the insurance does not become available until the *assured* has paid the loss."

Burke vs. *Guarantee etc. Co.,* 47 Misc., 171, 93 N. Y. Supp., 652;

Tube etc. Co. vs. *Casualty Co.,* 220 Pa., 42, 68 Atl., 1026;

Henderson vs. *Casualty Co.,* 29 Pa. Super. Ct., 398;

Finley vs. *Casualty Co.,* 113 Tenn., 592, 83 S. W., 2;

Allen vs. *Ins. Co.,* 145 Fed., 881; 76 C. C. A., 265, 7 L. R. A. (N. S.), 958;

Nesson vs. *U. S. Casualty Co.,* 201 Mass., 71;

Connolly vs. *Wilfred Bolster,* 187 Mass., 266, 72 N. E., 981;

O'Connell vs. *N. Y., N. H. and H. R. R. Co.,* 187 Mass., 272;

Van Reen vs. *Aetna Life Ins. Co.,* 209 Fed., 693;

West Riverside Coal Co. vs. *Maryland Casualty Co.,* 165 Iowa, 163;
Allen vs. *Gillman,* 137 Fed., 136.

Cases of this character have constantly been presented to the courts. Usually the question has been whether the assured has a right to bring an action upon such a policy, and the uniform current of authority is that the assured cannot so do.

Frye vs. *Bath Gas & Electric Co.,* 54 Atlantic, 395.

See also:

Moses vs. *Travelers Ins. Co.,* 49 Atl., 720;
Gilbert vs. *Winman,* 1 N. Y., 550;
Cushman vs. *C. F. Co.,* 98 N. W., 508;
Carter vs. *Aetna Life Ins. Co.,* 91 Pac., 178;
Allen vs. *Gilman & McNeil Co.,* 137 Fed., 136;
Allen vs. *Aetna Life Ins. Co.,* 145 Fed., 881;
Saratoga T. R. Co., vs. *Standard Acci. Co.,* 128 N. Y. S., 822;
Conqueror Z. & L. Co. vs. *Aetna Life Ins. Co.,* 133 S. W., 156;
Munro vs. *Maryland Cas. Co.,* 96 N. Y. S., 705;
Appel vs. *Peoples' Surety Co.,* 132 N. Y. S., 200;
Burk vs. London G. & A. Co., 93 N. Y. S., 652, affirmed in 93 N. E. 1117;

Kennedy vs. *Fid. & Cas. Co.,* 110 N. W., 97;
Connolly vs. *Bolster,* 72 N. E., 981;
Stenbohm vs. *Brown-Corliss Co.,* 119 N. W., 308;
Cayard vs. *Robertston & Hobbs,* 131 S. W., 864;
O'Connell vs. *Ry. Co.,* 72 N. E., 979;
Maahs vs. *Antigo Lbr. Co.,* 145 N. W., 222;
Pfeiler vs. *Penn Allen Portland Cement Co.,* 87 Atl., 623;
Beyer vs. *International A. C.,* 101 N. Y. S., 83;
Camel vs. *Maryland Casualty Co.,* 89 S. W. 452;
Brewster vs. *Empire State,* 130 N. Y. S., 439;
Poe vs. *Philadelphia Casualty Co.,* 84 Atl., 476;
Henderson vs. *Maryland Casualty Co.,* 69 S. E., 234;
Stevens vs. *Pacific Cas. Co.,* 3 Am. & Eng. Ann. Cas., 480;
Fuller's Employers' Liability Ins., pp. 451 to 458.

The difference between a contract of indemnity and one to pay legal liability is, that upon the former an action cannot be brought and a recovery had until the liability is discharged.

American Employers vs. *Fordyce,* 36 S. W., 1051.

"There is a difference between the effect of a policy which insures directly against liability and one that insures against loss or damage by reason of liability."

Finley vs. *United States Casualty Co.*, 83 S. W., 2.

"We are unable to perceive any ground on which the bill can be sustained and the relief prayed for granted. The contract of the insurer was with the gas company to indemnify that company 'against loss' from liability for damages on account of bodily injuries accidentally suffered by an employe and caused by the negligence of the assured. The use of the word 'indemnity' shows the object and nature of the contract. It was to reimburse, or make whole, the assured against loss on account of such liability. There can be no reimbursement when there has been no loss. The contract of insurance contains nothing to show that it was the object or intention of the contracting parties that the insurer should guaranty the gas company's liability for negligence to its employes. It was not a contract of insurance against liability, but of indemnity against loss by reason of liability. * * * In this case, as we have seen, the contract was one of indemnity only. It was not obtained by the gas company for the benefit of its employes, but for its own benefit exclusively. * * * Independently of the condition in the contract of insurance above quoted, we should be compelled to construe this contract as one of indemnity only."

Frye vs. *Bath Gas & Electric Co.*, 54 Atlantic, 395;

Ford vs. *Aetna Life Insurance Company,* 70 Wash., 29;

Scheard vs. *United States, etc.,* 58 Wash., 29;

Puget Sound Improvement Co. vs. *Frankfort,* 52 Wash., 124.

In *Ford* vs. *Aetna,* supra, p. 33, the Court says:

"We cannot assent to the respondent's interpretation of the policy. The policy indemnifies against loss, and not against liability."

"In clause B the appellant reserved the privilege and assumed the obligation of defendning claims for damages covered by the policy. But this does not imply that in the event the defense is unsuccessful it will pay the judgment." Ibid., 34.

"The respondent has no rights in the policy, either legal or equitable. The policy was not written for his protection, but it was written for the purpose of indemnifying the insured against loss sustained and paid." Ibid., 36.

"Subject to exceptions not here present, the plaintiff in garnishment can get no better right to the debt garnished than his debtor has; and if the latter has no right in or to the debt, the former acquired none in the garnishment." Ibid., 37.

Fidelity & Casualty Co. of N. Y. vs. *Martin,* 173 S. W., 307,

where the Court says:

> "The policy in question was not written for the protection of appellee or *even remotely for his benefit.* Its sole object was to indemnify the assured, Wells, against loss sustained and paid. As said in 15 Cyc., subd. 8, p. 1038:
>
> "'Insurance under a policy of this kind is a matter wholly between the insurance company and the assured, in which the employe has no legal or equitable interest any more than in any other property belonging absolutely to the assured.'"

173 S. W., 310,

after citing a Tennessee case, the Court said:

> "In directing the dismissal of the bill the Supreme Court of Tennessee held that an employe obtaining a judgment against his employer for a personal injury would not, on the insolvency of the latter, be entitled to a decree against an insurer in an indemnity policy, stipulating indemnity to the employer against loss for damages on account of bodily injuries, and that no action would lie against the insurer unless brought by the employer to reimburse himself for loss actually sustained—i. e., paid—although the insurer, following the happening of the accident and notice thereof, took exclusive control of the negotiations for a settlement and of the defense of the action brought by the employe for his injuries. This ruling seems to have been rested upon the ground that there was no privity of contract between the servant injured and the insurance company; *that the fund providing for an indemnity is not a trust fund.* * * * 'We had occasion in *Finley* vs. *Casualty Co.,* 113 Tenn., 592 (83 S. W., 2,

3 Ann. Cas., 962), to consider a policy in all material respects like the one at bar. We there recognized the distinction made by the authorities between a policy insuring an employer *against liability* and *one agreeing to indemnify the assured "against loss from liability for damages".'"*

Ibid, 312.

"Since it has no right of action there is nothing to which the plaintiff could be subrogated."

Quoted from *Pfeiler* vs. *Penn Allen Portland* Cement Co., 240 Pa., 468.

"Atkins was under no obligation to procure insurance for the benefit of the plaintiff, nor did any relation exist between the plaintiff and Atkins which could give the latter the right to procure insurance for the benefit of the plaintiff. The only correct statement of the situation is simply that the insurance was a matter wholly between the company and Atkins, in which the plaintiff had no legal or equitable interest, any more than in any other property belonging absolutely to Atkins."

Bain vs. *Atkins,* 181 Mass., 240.

"This view of the matter seems to overlook the fact that the purpose of the insurance company in framing its contract, as was done in that case, and the *instant case was not so much to require a solvent assured to first pay the judgment, as to prevent itself from being subrogated to a loss, which an insolvent assured was relieved by his insolvency from paying."*

173 S. W., p. 314.

"It was said in argument, and not controverted, that in 20 of the states the courts of last resort have given the insurance contract under consideration the construction here contended for by appellant, and that only in New Hampshire and Minnesota have the courts of last resort adopted the construction contended for by appellee. * * * While we accord great weight to the ability and high standing of the two courts referred to, their interpretation of the contract is so obviously out of harmony with the current of authority that we deem it unwise to adopt it."

173 S. W., p. 314.

"However deserving appellee may be of compensation what he is asking us to do is to aid him, a stranger to the contract, by giving it a meaning not authorized by its language, and that neither of the real parties to it intended it to have."

173 S. W., p. 314.

"The policies are written, not for the sake of injured employes, but for the benefit of employers, who have suffered loss by reason of their common law, or statutory liability. The premiums are paid by the employers, and the employers are the beneficiaries thereof. The policies now most commonly in force are contracts of indemnity against loss, and not of insurance against liability. They are not subscribed to for the benefit of injured employes, and there is no privity between them and the employers."

Fullers' Employers' Liability Insurance, pp. 464, 465.

"An ordinary indemnity contract of this character is not made for the benefit of the employe either in its express terms or in its underlying purposes."

Clark vs. *Bonsal,* 72 S. E., 954;
Camel vs. *Maryland Casualty Co.,* 97 N. E., 1026;
Stenbohm vs. *Brown-Corliss Co.,* 119 N. W., 308, 20 L. R. A. (N. S.), 956.

RE RATIFICATION OF UNAUTHORIZED ACT.

Davis' act being unauthorized, we insist that upon this record there is no evidence of ratification by this defendant. There is no evidence whatsoever that this Company ever knew of the giving of the indemnity agreement, or that the bond was applied for by Davis himself until the time of the bringing of this suit, or, to be more specific, until the time when the judgment having been paid by the plaintiff Company it called upon defendant below to reimburse it. It is elemental that ratification cannot exist unless the principal has knowledge of the act claimed to be ratified. The only thing suggestive of ratification is the payment of the premium, but this premium was paid in ignorance of the fact that the bond was issued at the request of Davis, and in total ignorance of the indemnity agreement. The premium on the bond was paid because this defendant below had agreed to insure the Elmo Rock Company against loss and *expense.* It was one of the expenses of the

litigation. Suppose the judgment against the Elmo Rock Company had been twenty-five thousand dollars instead of five thousand dollars, a stay bond would probably have been double that amount, or fifty thousand dollars. This Honorable Court would not hold it the duty of this plaintiff in error to furnish a stay bond in that amount, it being largely in excess of the five thousand dollars insurance mentioned in our policy. Yet in such instance, if the Elmo Rock Company obtained a bond from some surety company in the sum of fifty thousand dollars, or thereabouts, we would have been obliged to pay the premium thereon, and such obligation arises simply because said premium is an item of expense connected with the litigation.

LEEDS WAS MERELY A SOLICITING AGENT.

The general agent of the Company in Texas was J. F. Seinsheimer & Company. Their power or authority as general agent had ceased before Davis signed the indemnity agreement with defendant in error (See letter of July 30th, 1912, Record, page 144). But Leeds was merely a soliciting agent (See his deposition, Record, pp. 117, 118, 119). There is no testimony that the general agent, even had his authority still existed, ever authorized the giving of the indemnity agreement, save the mere thought or impression of Leeds, which was not admissible, and

which we moved to strike out, which motion was denied by the Court.

It is well established that the soliciting agent has not authority to bind his Company.

Shuggart vs. *Lycoming Fire Ins. Co.,* 55 Cal., 408, 414;

Enos vs. *Sun Insurance Co.,* 67 Cal., 621;

Gladding vs. *Cal. Farmers' M. F. I. A.,* 66 Cal., 6;

Cayford vs. *Metropolitan Life Ins. Co.,* 5 Cal. App., 715;

Iverson vs. *Metropolitan Life Ins. Co.,* 151 Cal., 746;

Westerfeld vs. *N. Y. Life Ins. Co.,* 129 Cal., 68;

Farnum vs. *Phoenix Ins. Co.,* 83 Cal., 246, 260-262;

Raulet vs. *Northwestern Nat. Ins. Co.,* 157 Cal., 213;

Mackintosh vs. *Agricultural Fire Ins. Co.,* 150 Cal., 440; 19 Am. St. Rep., 234;

McKay vs. *New York L. Ins. Co.,* 124 Cal., 270;

Northern Ass. Co. vs. *Grand View B. A.,* 183 U. S., 303; 46 Law Ed., 231.

The test as to whether a person is a soliciting or general agent is very clearly drawn in this State.

Iverson vs. *Met. Life Ins. Co.,* 151 Cal., 747;
Westerfeld vs. *N. Y. Life Ins. Co.,* 129 Cal., 68;
Raulet vs. *Northwestern etc. Ins. Co.,* 157 Cal., 213;
Mackintosh vs. *Agricultural Fire Ins. Co.,* 150 Cal., 440.

In other words, Leeds as a soliciting agent had no authority to enter into or consummate a contract on behalf of this defendant, and whatever he may have done in the premises, unless communicated to and ratified by this defendant, is immaterial.

Plaintiff proceeds to argue that the knowledge obtained by the soliciting agent is imputable to the defendant. But such is not the case. The knowledge of a soliciting agent is not the knowledge of the Company.

Shuggart vs. *Lycoming Fire Ins. Co.,* 55 Cal., 408, 414;
Enos vs. *Sun Insurance Co.,* 67 Cal., 621;
Gladding vs. *Cal. Farmers' M. F. I. A.,* 66 Cal., 6;
Cayford vs. *Metropolitan Life Ins. Co.,* 5 Cal. App., 71;

Iverson vs. *Metropolitan Life Ins. Co.*, 151 Cal., 746;

Westerfeld vs. *N. Y. Life Ins. Co.*, 129 Cal., 68.

We therefore respectfully submit that the judgment appealed from herein should be reversed, and this plaintiff in error granted a new trial. The defendant in error did not by reason of paying the judgment under its supersedeas bond have any right of action against this plaintiff in error. The only rights to which it was subrogated as surety, having discharged the judgment, were the right to reimbursement from the Elmo Rock Company. The judgment was not paid or discharged by the Elmo Rock Company, or by defendant in error, if it were paid or discharged at all. The record, however, indicates that it was not discharged, but merely bought or purchased by the surety. As to the indemnity agreement, Mr. Davis was not the agent of this plaintiff in error for the purpose of signing any such agreement. His act was void, and never was ratified by the plaintiff in error, as said plaintiff in error never had knowledge or notice of his act. The policy of insurance set out in the complaint is unassignable until after loss has been sustained and paid by the assured.

Under every view of the case, we respectfully insist

that the judgment is erroneous and that a new trial should be ordered.

Respectfully submitted.

MYRICK & DEERING,
Attorneys for Plaintiff in Error.

JAMES WALTER SCOTT,
Of Counsel.